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NO. 80-677

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

RAY TURNIPSEED, BERTHA TURNIPSEED,
MACKENZIE TURNIPSEED,
DAVID PAINTER, and MELVYN LOCKWOOD,
Petitioners,
v.
UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ABCD AT CRAFTSMAN PRESS, SEATTLE

QUESTIONS PRESENTED FOR REVIEW

(1) Whether a Native American who resides on trust lands within the boundaries of his tribal reservation, may be tried for alleged violation of the Organized Crime Act (18 U.S.C. § 1955) in Federal Court?

(2) Whether one employed by a Native American conducts business on trust land within the boundaries of his tribal reservation, may be tried for alleged violation of the Organized Crime Act (18 U.S.C. § 1955) in Federal Court?

(3) Whether the Organized Crime Act (18 U.S.C. § 1955) is unconstitutionally vague, as applied to gambling activities conducted by a tribal member on an Indian reservation? and

(4) Whether the State of Washington prohibits gambling or regulates gambling?

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NO._____

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RAY TURNIPSEED, BERTHA TURNIPSEED,
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DAVID PAINTER, and MELVYN LOCKWOOD,
Petitioners,
v.
UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

INTRODUCTION

On October 10, 1978 the Grand Jury Indictment was issued, charging the petitioners, Bertha Turnipseed, Mackenzie Turnipseed, Ray Turnipseed, David Painter, Melvin Lockwood and others with illegal gambling involving the playing of blackjack and poker, in violation of the Revised Code of Washington 9.46. That such activity was

therefore in violation of Title 18, U.S.C., § 1955[1] (a) and (b) and 2.

The activities of the Turnipseeds' were done openly and on land held in trust held by the United States. Said land being held in trust for Bertha Turnipseed.

Bertha Turnipseed, and her son, Mackenzie Turnipseed, are enrolled members of the Puyallup Indian Tribe. Ray Turnipseed is not a member of the Puyallup Indian Tribe, but is the husband of Bertha Turnipseed. David Painter and Melvin Lockwood are non-Indians, but were employees of the Turnipseeds.

Bertha Turnipseed was the owner of a business and her son, Mackenzie Turnipseed, was her general manager. The gambling activities were done openly and with advertisement.

---

[1] See infra, under Statutes Involved Section.

Petitioners' Motions to Dismiss were denied. The court found the petitioners guilty, and entered the Judgment and Commitment Order on March 16, 1979, imposing a fine of TEN THOUSAND AND NO/100 ($10,000) DOLLARS each on Ray Turnipseed, Bertha Turnipseed and Mackenzie Turnipseed, and imprisonment for sixty (60) days. Petitioners Lockwood and Painter were fined each THREE THOUSAND AND NO/100 ($3,000) DOLLARS, and the imposition of any imprisonment sentence was suspended, on the condition that they each serve a two year period of probation.

All petitioners are free on their personal recognizance, pending appeal.

OPINIONS BELOW

On June 11, 1980 the Ninth Circuit Court of Appeals (Appendix A #1 to this

Petition at p. 3 hereto attached) affirmed the petitioners' convictions pursuant to 18 U.S.C. § 1955. The petitions for rehearing were timely filed and were denied. (Appendix A #2 to this Petition at p. 3 hereto attached.) On August 14, 1980, the court entered an order amending the earlier opinion but denying petitions for rehearing on behalf of the Turnipseeds. (Appendix B to this Petition at p. 2 hereto attached.) On September 3, 1980, Motion and Affidavit for Recall of the Mandate, Pending Application for Certiorari to the Supreme Court of the United States was made. To date, no order has been entered on this motion.

JURISDICTION

Appellee argues federal court jurisdiction pursuant to 18 U.S.C. § 1955(a), (b), and 2. Petitioners assert that this statute is inapplicable to them. The

jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Whether a Native American who resides on trust lands within the boundaries of his tribal reservation, may be tried for alleged violation of the Organized Crime Act (18 U.S.C. § 1955) in Federal Court?

(2) Whether one employed by a Native American conducts business on trust land within the boundaries of his tribal reservation, may be tried for alleged violation of the Organized Crime Act (18 U.S.C. § 1955) in Federal Court?

(3) Whether the Organized Crime Act (18 U.S.C. § 1955) is unconstitutionally vague, as applied to gambling activities conducted by a tribal member on an Indian reservation? and

(4) Whether the State of Washington prohibits gambling or regulates gambling?

STATUTES INVOLVED

Section 1955 of Title 18, United States Code provides in part:

> (a) Whoever conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business shall be fined . . .

As used in this section:

> (1) "Illegal gambling business" means a gambling business which . . .
>
> (2)(i) If the violation of a law of a state or a legal subdivision in which it is conducted. (emphasis added)

Section 1175 of Title 15, United States Code provides:

> It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in section 1151 of title 18 of the United States Code [18 USCS §1151] or within the special maritime and territorial jurisdiction of the United States as defined in section 7 of title 18 of the United States Code [18 USCS §7].

Section 13 of Title 18 United States Code reads:

LAWS OF STATES ADOPTED FOR AREAS WITHIN FEDERAL JURISDICTION. Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in Section 7 of this title, is guilty of any act or omission which although not made punishable by an enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(June 25, 1948, c. 645, § 62 Stat. 686.)

Section 1952 of Title 18 United States Code Service reads in part:

INTERSTATE AND FOREIGN TRAVEL OR TRANSPORTATION IN AID OF RACKETEERING ENTERPRISES.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to --

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter

> performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling . . .

(Added Sept. 13, 1961, P.L. 87-228, § 1(a), 75 Stat. 498; July 7, 1965, P.L. 89-68, 79 Stat. 212; Oct. 27, 1970, P.L. 91-513, Title II, Part G, § 701(i)(2), 84 Stat. 1282).

Section 1254 of Title 28 United States Code Service reads in part:

> COURTS OF APPEALS: CERTIORARI: APPEAL: CERTIFIED QUESTIONS.
>
> Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree
>
> (2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of certiorari at the instance of such appellant,

> and the review on appeal shall be restricted to the Federal questions presented . . .

(June 25, 1948. c. 646, § 1, 62 Stat. 928.)

RCW 9.46.030; 9.46.010; 9.46.070 and 37.12.010, are attached hereto as Appendix D.

STATEMENT OF THE CASE

I. Section 1955 of Title 18 U.S.C. Is Inapplicable to Petitioners

Petitioners argue that their activities were not "in violation of the law of this state," because Washington State Gambling Laws do not extend into the reservation boundaries. It follows then, that said actions undertaken by Indians on an Indian Reservation are not punishable acts pursuant to § 1955. The Ninth Circuit Court of Appeals observed:

> We hold that appellants premise is correct but the conclusion does not follow.

(Appendix A #1 at p. 13, hereto attached.)

Petitioners respectively contend that the holding of the Ninth Circuit Court of Appeals was erroneous. The requirement of finding a violation of state law was noted in Sanabria v. United States, 437 U.S. 54, 57 L. Ed. 43, 98 S. Ct. 2170, wherein the Supreme Court held that violations of state law was a jurisdictional element which must be proven. Absent a violation of state law, the federal court is deprived of criminal jurisdiction for such as is the purpose of the limitation period. Therefore, it would appear that the Ninth Circuit Court of Appeals' finding that the State of Washington is without jurisdiction is a necessary requisite to this appeal.

A closer reading of § 1955 clearly shows that Congress did not explicitly include the Puyallup Indian Tribe, nor any Native American, within coverage of the statute. Likewise, there is nothing either in the statute itself, or its legislative

history which shows any intent on the part of Congress to abrogate the Treaty of Medicine Creek, 10 Stat. 1132 (1854) and allow the Puyallup Tribe exclusive use and control of their lands. The "Anti-Racketeering" Statutes (18 U.S.C. § 1951-1955) were enacted to control syndicated gambling conducted through large scale operations. The target was "the infiltration of illegitimate organizations by organized crime." United States v. Sacco, 491 F.2d 995 (9th Cir. 1974) and United States v. Burgess, 493 F.2d 918 (5th Cir. 1974). The Ninth Circuit in its order of June 11, 1980 (Appendix 1 to this Petition at p. 5-6 hereto attached) alluded to the need to protect the interstate commerce and prevent the infiltration of organized crime for legitimate organizations. Yet, there is not one iota of evidence which would support such a conclusion. Quite the

contrary, the government, itself stipulated:

> During its nine months of operation; the Government did not uncover showing a connection of the Indian houses (casinos) to organized crime.

II. The Federal Court Lacks Jurisdiction Under 18 U.S.C. § 1955

The Puyallup Tribe of Indians is an existing active tribe, recognized as such by the United States. It consists of the descendants of the original Puyallup Tribe, whose territorial and sovereign rights were expressly recognized in the Treaty of Medicine Creek for the United States. The history of the Puyallup Tribe has been set forth in United States v. Washington, 384 F. Supp. 312, aff'd, 520 F.2d 676 (9th Cir. 1975); cert. denied, ___ U.S. ___ (1976).

Inasmuch as the Puyallup Tribe is a sovereign nation, they have the right to pass their own laws, rules and regulations.

In order to keep its sovereignty, it must have taxing authority. Pursuant to its business code, it does tax tribal members doing certain business activities, within the reservation. The effect of affirming the convictions of a member of the Puyallup Tribe for gambling activities under 18 U.S.C. § 1955 is not just to chill the tribes ability to enact laws governing the gambling activities of its members, but serves to nullify such internal legislative efforts and taxing powers.

III. Section 18 U.S.C. § 1955 Is Unconstitutionally Vague

The Organized Crime Act (18 U.S.C. § 1955 is unconstitutionally vague as applied to Indian activities in Indian country.

This court, in Connally v. General Construction Company, 269 U.S. 385 (1926) formulated a vagueness standard to be applied to penal statutes. The terms in a new offense must be sufficiently explicit

to inform those who are subject to it, what conduct on their part rendered them liable to a penalty. Id. at 391. If men of common intelligence must guess at the meaning of a statute, then the statute violates due process of law. As a viable segment of the doctrine of fundamental fairness, the rule that where there is an ambiguity in a criminal statute, all doubts must be resolved in favor of the defendant controls. United States v. Basi, 404 U.S. 336 (1971).

Additional confusion existed in the Western District of Washington, pursuant to an injunction (Appendix A #3 hereto attached) issued under the case of United States v. Robert Satiacum, et al., defendants, No. C-76-101T, wherein on January 21, 1977 the Honorable Donald S. Vorhees entered an injunction which provided in part as follows:

> The individuals were enjoined from:
>
> Running, operating, conducting, financing, supervising, directing, owning or providing equipment or services to any gambling activity that violates federal law, including gambling activities which are licensable under Washington State law, defendants shall be permitted on any Indian reservation to engage in the same gambling activities which are being licensed outside of Indian reservations by the Washington State Gambling Commission at the time in question.[2]

It is clear that the operations of the petitioners fit within the limitations expounded in the injunction, and that under the Medicine Creek Treaty rights, they were not subject to the regulations of the

---

[2] In 1976, shortly before United States v. Satiacum, et al.; (Appendix 3., hereto attached), civil action was filed, criminal charges were brought against Satiacum (a Puyallup Native American) for similar activities like those of petitioners. At the suggestion of the Honorable Judge Donald S. Vorhees, U.S. District Court for the Western District of Washington, that the matter be pursued on a civil basis, the U.S. Attorney's Office dismissed the criminal charges. In view of this fact, how then can petitioners be held accountable pursuant to 18 U.S.C. ¼ 1955 for their acts?

Washington State Gambling Commission. However, neither the Ninth Circuit Court of Appeals nor the District Court alluded to this fact.

As a corollary to this argument, petitioners submit that a fundamental issue of due process is presented by the facts of this appeal. The vagueness of § 1955, by its reference to State Gambling laws, rules and regulations, raise questions of fundamental fairness to an Indian who believes in good faith, that State Gambling Laws do not reach him on the reservation.

In United States v. Sacco, supra, the court held that § 1955 was not unconstitutionally vague as it pertained to terms like "gross revenue", "involves", and "conducts". The court did not specifically address the term "violation of the law of the state."

The Ninth Circuit Court of Appeals in its June 11, 1980 opinion (Appendix A #1 to

this Petition, at p. 6), citing United States v. Sacco, supra, stated:

> Since Congress has the power to incorporate by reference state law, § 1955 does not violate the equal protection component of a due process clause, even though it applies only in states where gambling is illegal.

This statement is contradictory to the premise taken by the Ninth Circuit Court of Appeals that Washington State Gambling Laws do not extend into reservation boundaries. Therefore, if there is no "violation of the law of this state, § 1955 is not applicable to the petitioners".

It is settled when the law is vague, or highly debatable, a defendant actually or imputedly lacks the requisite intent to violate it. United States v. Critzer, 498 F.2d 1160 (4th Cir. 1974).

The Critzer case was a criminal tax fraud proceeding, brought against a Cherokee Indian. The court in discussing the

charge, found the statutory construction so "uncertain" and "problematical" that criminal liability could not attach. The court stated that "even if she had consulted the law and sought to guide herself accordingly, she could have had no certainty as to what the law required." Although the issue in the instant case is distinct in substance from that in Critzer, they both lead to the same conclusion, and emphasize the same goals; namely, that criminal charges cannot be based upon penal statutes whose mandates are reasonably subjected to different constructions.

It is petitioners' position that their gambling activities were well settled, authorized and regulated by the State of Washington. Under the Medicine Creek Treaty rights, they were not subject to the regulations of the Washington State Gambling Commission, any more than they are

subject to the orders of Pierce County, Washington, in such matters as licensing and building permits. United States v. Marcyes, 557 F.2d 1361 (9th Cir. 1977), and Snohomish County v. Seattle Disposal, 70 Wn.2d 668, 425 P.2d 22 (1967).

IV. The State of Washington Does Not Prohibit Gambling, or Regulates Gambling

The gambling activities of the petitioners, as conducted, could not, and did not, violate the prohibition of Chapter 9.46 of the laws of the State of Washington, because the State of Washington has not purported to assert such jurisdiction of its criminal laws in this area, pursuant to RCW 37.12.010. The activities become subject to the statutes criminal sanctions, only if the activities are unlawful at the site where they are carried on. To sustain the convictions of the petitioners would in fact subject the Indian Tribes to the

jurisdiction of state laws in excess of what Congress had authorized and intended. See also, McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1972).

The Washington State Legislature set forth the public policy of the State of Washington, as it pertains to gambling under RCW 9.46, et seq. Also, in the enabling legislation and designated RCW 9.46.070, the Washington State Gambling Commission was created.

The government contends that the petitioners cannot legally conduct their activities until properly licensed as required by RCW 9.46.030. Consequently, the gambling activity of the petitioners are currently in violation of state law, and therefore come under the scope of 18 U.S.C. § 1955. This contention, however, is not only dubious, but repugnant to the equal protection clause of the Fourteenth

Amendment and violates the spirit and the letter of the Treaty of Medicine Creek.

The indictment charges the petitioners with "illegal gambling business, involving the playing of blackjack and poker in violations of the law of the state where the gambling business was conducted". (RCW 9.36.) The public policy of the State of Washington authorizes gambling, and pursuant to provisions of RCW 9.46.010, et seq. Where the state does have jurisdiction, the Washington State Gambling Commission sets forth the rules and regulations as it pertains to gambling. Such rules and regulations, however, would not apply to petitioners.

The Washington State Gambling Commissions' regulation WAC 23-02-010 provides in part:

> WASHINGTON STATE GAMBLING COMMISSION. The Washington State Gambling Commission hereinafter called "the commission" is the commission appointed by the governor pursuant

> to RCW 9.36.040 as the licensee and regulatory agency charged with authority and duty to control statutorily authorized non-professional gambling activities . . .

Thus, pursuant to its own definition, it is a licensing and regulatory agency. As such, these rules do not apply to the petitioners in their operations.

One of the allegations in the indictment is the fact that petitioners were engaged in illegal poker. Again the State law authorizes poker to be played under the provisions of WAC 230-02-420.

> WAC 230-02-405 SPECIFIC AUTHORIZED CARD GAMES. Each card game authorized by name by the commission under WAC 230-40-101 except Mah-jongg, means the basic game listed and defined by that name in Hoyle's Modern Encyclopedia of Card Games by Walter B. Gibson, published by Doubleday & Company, Inc., April 1974 edition; PROVIDED, That immaterial modifications to the published definitions may be made by each licensee if each modification is posted upon the premises where it can be clearly seen by the players in the card games.
>
> WAC 230-02-410 PUBLIC CARD ROOM. A public card room is that area of the premises of a profit seeking

retail business which has been specifically set aside or designated by the licensee and approved by the commission for the playing of cards by members of the public as a commercial stimulant to that business in accordance with state law and the rules of the commission.

WAC 230-02-415 PUBLIC CARD ROOM EMPLOYEE DEFINED. A public card room employee is any person who is employed by a public card room operator, for compensation or otherwise, to work in, or in direct connection with, a public card room whose duties or responsibilities include any of the following:

(1) Floor person,
(2) Time Collector,
(3) Chip Seller,
(4) Dealer of mucker,
(5) Cashier,
(6) Pit boss,
(7) Card room manager,
(8) Supervision of any person working in, or in connection with, the card room.
(9) The prevention or discovery of cheating by persons playing in the card room or of improper activities by employees working in the card room.
(10) To encourage the organization and/or beginning of a card game.

This definition does not include bartenders, waitresses and persons with similar duties who are limited to the serving of food or drink in the card room. (New Rule Effective 6/24/78.)

> WAC 230-02-420 SOCIAL CARD ROOM. A social card room is that area of the premises of a bona fide charitable or nonprofit organization which has been specifically set aside or designated by the licensee and approved by the commission for the playing of cards by bona fide members of that organization and their guests only, in accordance with state law and the rules of the commission.

The other allegation is that the petitioners were engaged in illegal blackjack gambling. Blackjack is specifically authorized under WAC 230-25-235 which provides as follows:

> FUND RAISING EVENT - RULES FOR BLACKJACK. The game of "21" (blackjack) when played as part of a licensed fund raising event shall be played in conformance with the following:
>
> (1) Cards shall be dealt from a dealing shoe. The deal shall begin with the shoe containing four full decks of cards and proceed until, in the dealer's judgment, the cards should be reshuffled, or the cards withdrawn for examination and/or replaced. The shoe shall then be refilled with four decks of cards and the process repeated.

(2) All cards shall be dealt to the players face up.

(3) Players are not to remove or pick up cards from the table.

(4) Only "standard size" playing cards shall be used.

WAC regulation 230-25-055 allows the use of chips in the same fashion as was used by the petitioners in their operation. The WAC regulation is as follows:

> USE OF CHIPS, SCRIPT OR SIMILAR ITEMS AT FUND RAISING EVENT. All chips, script or similar items, used as a substitute for money at a fund raising event shall be issued only during and at the fund raising event itself.

WAC regulation 230-25-020 provides as follows:

> FUND RAISING EVENT - LICENSEE TO GIVE NOTICE TO LOCAL POLICE JURISDICTION PRIOR TO CONDUCTING - INSPECTION OF EQUIPMENT BY POLICE. No person licensed to conduct fund raising events shall conduct any such event at any location within the State of Washington without having first given notice to the local police agency of the jurisdiction within which the fund raising events are to be conducted. Such

> notice shall be in writing, addressed to the head of the local police agency, and shall be delivered no less than ten days in advance of the date upon which the fund raising event is to be conducted: PROVIDED, That this time may be reduced by the chief officer of the local law enforcement agency for good cause shown. . .

This regulation authorizes the use of mechanical devices which is prohibited under 15 U.S.C. § 1175. In this regulation the state has authorized such mechanical devices as roulette wheels. All of the activities authorized under the above quoted WAC regulations was carried on within less than a mile of the petitioners' operation within the City of Fife and within the boundaries of the Puyallup Indian Reservation. Certainly there is a failure of equal protection to the petitioners and the action of the United States Government is discriminatory against Native Americans. The United States Attorney's

Office is attempting to do for the State of Washington what the State of Washington cannot do for itself.

Inasmuch as gambling is not prohibited in the State of Washington, and is merely regulatory by the regulations of the Gambling Commission, there was no illegal gambling being carried on by the defendants.

In the case of United States v. Marcyes, supra, the court was considering a Class C type of fireworks. The question came down basically to whether the State law was regulatory or prohibitory. The defendants had been charged under the Assimulated Crime Act, 18 U.S.C. § 13. The court came to the conclusion in that particular case that it was prohibitory rather than regulatory, and sustained the conviction of the defendants on that part of the case.

Under the provisions of RCW 9.46.010, et sequence, and the WAC regulations of the Washington State Gambling Commission, it is clear that the activities which the defendants-appellants were involved in were regulated by the State of Washington. The public policy of the State of Washington has been established by the legislature authorizing gambling in the State, then the regulations would not apply to Indians operating within the tribal boundaries. The very type of activities that the petitioners are accused of, to-wit: "the playing of blackjack and poker in violation of the laws of the State" are regulated by the State.

There is no showing that any of the Indian gambling, involved in these appeals, was in any way connected with organized crime. Under the basic rules of agency, employees of the Native Americans could

legally assist in the operation of the business.

REASONS FOR GRANTING WRIT

Pursuant to Rule 17(a) of the United States Supreme Court Rules, it is respectfully asserted that the Ninth Circuit Court of Appeals has "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court (United States District Court) as to call for an exercise in this court's power of supervision."

The opinion by the Ninth Circuit Court of Appeals rendered on June 11, 1980 and amended on August 14, 1980, is indicative of a court exceeding its judicial powers and impeding those powers of Congress.

CONCLUSION

The decision below is palpably erroneous. It raises additional ambiguities as

it relates to § 1955 and its application to petitioners.

Furthermore, the state does authorize gambling and regulates it. Such regulations do not apply as to Native Americans within an Indian Reservation, just as taxation, building codes and/or business licenses do not apply to such Native American activities. Any doubts should be resolved in favor of the petitioners.

It is apparent from reading the opinion of the Ninth Circuit Court, that the court exceeded its judicial powers by enlarging legislation, a function delegated to Congress.

For the reasons set forth above, it is respectfully submitted that this Petition for Certiorari be granted.

DATED this 10th day of October, 1980.

Respectfully submitted,

DONALD H. McGAVICK and
ANNON MAY

Attorneys for Petitioners

APPENDIX A

[Filed
June 11, 1980]
Clerk, U. S. Court
of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	No. 78-3517
	)	
v.	)	DC CR 78-40-1
	)	
HAROLD FARRIS,	)	
	)	
Defendant-Appellant.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	No. 78-3567
	)	
v.	)	DC CR 78-52-1
	)	
JODY SATIACUM,	)	
	)	
Defendant-Appellant.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	No. 79-1013
	)	
v.	)	DC CR 78-35
	)	
ALLEN DUDLEY POWELL,	)	
	)	
Defendant-Appellant.	)	
	)	

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LOUIS J. BAKER, Defendant-Appellant.	No. 78-1015 DC CR 78-40-3
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RAY TURNIPSEED, BERTHA TURNIPSEED, and MACKENZIE TURNIPSEED, Defendant-Appellant.	No. 79-1313 DC CR 78-76T-1/2/3
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DAVID PAINTER, Defendant-Appellant.	No. 79-1337 DC CR 78-76-4

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 79-1338
	)	DC CR 78-76-5
v.	)	OPINION
MELVYN LOCKWOOD, Defendant-Appellant.	)	

Appeal from the United States District Court for the Western District of Washington

Before: BROWNING, CHOY and KENNEDY, Circuit Judges. CHOY, Circuit Judge:

Appellants attach their convictions under 18 U.S.C. § 1955 on the ground that their large-scale gambling businesses on Indian trust land did not violate state law, and on other grounds. We affirm.

I. Background: The Law

Enacted as part of the Organized Crime Control Act of 1970, 18 U.S.C. § 1955 reads in pertinent part:

> (a) Whoever conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling

business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section --

(1) "illegal gambling business means a gambling business which --

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(Emphasis added.)

We held in United States v. Sacco, 491 F.2d 995 (9th Cir. 1974) (en banc), that § 1955 "was aimed at curtailing syndicated gambling, the lifeline of organized crime, which provides billions of dollars each

year to oil its diversified machinery." Id. at 998. "Congress determined that organized crime posed a major threat to American society and that illegal gambling operations provided organized crime with its greatest source of revenue." Id. at 999.

Judge Browning correctly says that § 1955 was designed to aid the enforcement of state law, especially where state enforcement is disabled by the corruption of state officials, but the statute also serves to further independent federal interests. Congress found that "illegal gambling involves widespread use of, and has an effect upon, interstate commerce and the facilities thereof," id. at 999; moreover, "[t]he illicit operations were seen to distort the production of goods for commerce and the flow of goods in interstate commerce," id. at 1000.

Section 1955 is constitutional, even as applied to cases with no connection with interstate commerce or organized crime. Id. at 999-1000. It is not unconstitutionally vague. Id. at 1001-02.

Since Congress has the power to "incorporate by reference" state law, § 1955 does not violate the equal protection component of the due process clause even though it "applies only in states where gambling is illegal." Id. at 1003.

II. Background: The Facts

On the generally disputed facts, appellants stand guilty under this section unless the words "violation of the law of a State" exempt them. In 1977 and 1978, appellants operated significantly profitable casinos on Puyallup Indian reservation land within one mile of Tacoma and 25 miles of Seattle. The casinos, without any approval or license from the Washington

State Gambling Commission, featured black-jack, poker and dice; their large net win was obtained at the expense of a clientele that included many non-Indians and some out-of-staters. Farris, Satiacum, Bertha Turnipseed and MacKenzie Turnipseed are Puyallup Indians; Baker, Powell, Lockwood, Painter and Ray Turnipseed are not.[1/]

III. Issues

A. Applicability of § 1955 to Indians

The Puyallup appellants first claim that § 1955 does not apply to them at all. However, federal laws generally applicable throughout the United States apply with equal force to Indians on reservations. For example, even as to Indians on reservations, federal jurisdiction extends "to crimes over which there is federal jurisdiction regardless of whether there is an Indian involved, such as assaulting a federal officer." United States v. Wheeler, 435 U.S. 313, 330 n.30 (1978);

accord, Walks on Top v. United States, 372 F.2d 422 (9th Cir.) (assaulting a federal officer), cert. denied, 389 U.S. 879 (1967); see United States v. Burns, 529 F.2d 114 (9th Cir. 1976) (possession of firearm by a felon); Head v. Hunter, 141 F.2d 449 (10th Cir. 1944) (forgery to defraud the United States).

There seems to be three exceptions to this rule, but appellants fall within none. First, reservation Indians may well have exclusive rights of self-governance in purely intramural matters, unless Congress has removed those rights through legislation explicitly directed at Indians. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978), citing Roff v. Burney, 168 U.S. 218 (1897) (tribal membership); Jones v. Meehan, 175 U.S. 1 (1899) (inheritance rules); and United States v. Quiver, 241 U.S. 602 (1916) (domestic relations). Or, to put it another way,

"Indian tribes retain exclusive jurisdiction over essential matters of reservation government, in the absence of specific Congressional limitation." Arizona ex rel. Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969), cert. denied, 396 U.S. 1003 (1970). But even a general federal law suffices to proscribe the large-scale professional gambling involved here; such gambling is neither profoundly intramural (the casinos' clientele was largely non-Indian) nor essential to self-government.

Second, it is presumed that Congress does not intend to abrogate rights guaranteed by Indian treaties when it passes general laws, unless it makes specific reference to Indians. Antoine v. Washington, 420 U.S. 194 (1975); Menominee Tribe v. United States, 391 U.S. 404 (1968); United States v. White, 508 F.2d 453 (8th Cir. 1974). But this rule applies only to subjects specifically covered in

treaties, such as hunting rights, usually, general federal laws apply to Indians. E.g., Superintendent v. Commissioner, 295 U.S. 418 (1935) (income tax). A different norm would only necessitate a huge quantity of statutory boilerplate.

To bring the special rule into play here, general treaty language such as that devoting land to a tribe's "exclusive use" is not sufficient (although such language does suffice to oust state jurisdiction); there would have to be specific language permitting gambling or "purporting to exempt Indians from the laws of general applicability throughout the United States regardless of situs of the act." United States v. Burns, 529 F.2d 114, 117 (9th Cir. 1976). Of course, there is no such specific language in the United States' treaty with the Puyallups, the Treaty of Medicine Creek, 10 Stat. 1132 (1854).

Finally, if appellants could prove by legislative history or some other means that Congress intended § 1955 not to apply to Indians on their reservations, we would give effect to that intent. But no evidence of such Congressional intent exists; indeed, "it defies reason to suppose that Congress intended" such an exemption, see United States v. Montana, 604 F.2d 1162, 1168 (9th Cir. 1979). Puyallup casinos in the Tacoma-Seattle area would flourish as mightily as those in such areas as Las Vegas and Atlantic City. Exempt from federal and state regulation, casinos on Indian land would defeat or endanger the federal interests of protecting interstate commerce and preventing the takeover of legitimate organizations by organized crime. We think the following passage from United States v. Montana bears repeating:

> We must recognize that in this case, as in others in which we are required to fix the rights and powers of Indians in the latter part of the twentieth century in the light of treaties of an earlier century, our task is to keep faith with the Indian while effectively acknowledging that Indians and non-Indians alike are members of one Nation. Both seek power and gain through identical processes, viz. commerce, politics, and litigation. We must, however, live together, a process not enhanced by unbending insistence on supposed legal rights which if found to exist may well yield tainted gains helpful to neither Indians nor non-Indians.

Id. at 1169. We find that Congress did not intend that Indians could freely engage in the large-scale gambling businesses that it forbade to all other citizens.

Therefore, we hold that § 1955 applies to appellants.

B. "Violation of the Law of a State"

1. Puyallup Appellants

The Puyallup appellants argue that even if § 1955 applies to them, they are not guilty of violating it. The casinos

they operated on reservation land were not "in violation of the law of a State," they say, because the Washington state gambling laws do not extend past the reservation boundaries. We hold that appellants' premise is correct, but that their conclusion does not follow.

a. State Jurisdiction Over Gambling

The originally independent Indian nations, after conquest or acceptance of United States protection, came under federal control and the plenary power of Congress to remove every aspect of sovereignty from them. "But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." Unites States v. Wheeler, 435 U.S. 313, 323 (1978).

The treaty with the Puyallups is the Treaty of Medicine Creek, 10 Stat. 1132 (1854). Article II of the Treaty says that reservation land shall be "marked out for their exclusive use." Comparable language in other Indian treaties has been held to preserve Indian self-government as against state regulation. E.g., Williams v. Lee, 358 U.S. 217, 221-22 (1959).

Therefore, the traditional rule is that states have no criminal jurisdiction over offenses committed by Indians on Indian trust land. The rationale for this rule, however, has been changing: "[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption." McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 172 (1973); compare Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). The Ninth

Circuit takes the modern position. Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 658-59 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1977).

However, in 1953 Congress delegated to the states some of its power to regulate affairs on Indian reservations, by passing the Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 ("Public Law 280"). Section 2 of "Public Law 280," codified at 18 U.S.C. § 1162(a), immediately placed enumerated Indian lands near the full criminal jurisdiction of the states they were located in. (This section did not include the Puyallup land.) Section 7 of "Public Law 280" gave the necessary federal consent for states to take full criminal jurisdiction over all other Indian lands, if the state passed legislation to that effect. Under this section, Washington in 1963 enacted Wash. Rev. Code § 37.12.010 and took jurisdiction over its Indians and

Indian lands (including the Puyallups and their land). However, as to acts both committed by Indians and committed on Indian land, Washington took jurisdiction only over eight specific subject areas -- chiefly welfare, family law and motor vehicles -- but not gambling. Apart from this statute, the Washington courts do not have jurisdiction over crimes committed by Indians on Indian land, unless the tribe in question has requested the state to assume jurisdiction. See Arquette v. Schneckloth, 56 Wash. 2d 178, 351 P.2d 921 (1960). This partial assertion of jurisdiction was recently upheld in Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979).[2/]

On the other hand, § 37.12.010 asserted full criminal jurisdiction in all subject areas over offenses committed on Indian land by non-Indians. This state jurisdiction is "complete." 439 U.S. at

498. Indeed, it is fitting for a state to take such jurisdiction over non-Indians, for under no circumstances could such offenders be tried in tribal courts anyway. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

In sum, Washington may not enforce its gambling laws against the Puyallups on their reservation; however, it may enforce those laws against non-Indians, even on the Puyallup reservation.

b. No Immunity From § 1955

Given that Washington cannot enforce its gambling laws against the Puyallup appellants for their actions on Puyallup trust lands, nonetheless their actions were a "violation of the law of a State" for purposes of § 1955. The reason for that limitation was not to exempt from federal criminal liability those gambling-business operators who might be beyond the reach of a state's criminal jurisdiction, but rather

to exempt from the federal statute the operators of gambling businesses that are not contrary to a state's public policy on gambling. Congress' intent was merely that § 1955 not apply indiscriminately to Nevada casino operators, Florida fronton operators, etc. Section 1955 as written "applies only in states where gambling is illegal." United States v. Sacco, 491 F.2d at 1003.

Washington public policy prohibits the type of gambling business conducted by appellants. See Wash. Rev. Code §§ 9.46.010, 9.46.220. Therefore, for the purposes of the federal statute, their business was a "violation of the laws of a State . . . in which it is conducted." The policy underlying § 1955 is that large-scale gambling is dangerous to federal interests wherever it occurs. The limitation of § 1955 to gambling that is a "violation of the law of a State or political subdivision in which

it is conducted" does not reflect a Congressional judgment that gambling countenanced by state and local authorities does not harm federal interests; rather, it reflects Congress' judgment that the harm is outweighed by the interest of federalism that national legislation not trample the desires of particular states, which on the subject of gambling are expressed by the lack of prohibitory laws.

If the appellants' argument prevailed, the federal interests served by § 1955 would be thwarted, without any benefit to the countervailing federalism interest. Casinos would operate in a major population center without any state or federal (or tribal) regulation. It would not be long before organized crime moved in on this golden opportunity. As the appellants ironically take pains to point out, one purpose of § 1955 was to prevent organized-

crime infiltration of legitimate organizations. S. Rep. No. 617, 91st Cong., 1st Sess. 80 (1969). The federal law could thus be most appropriately applied here, for the casino operations placed the tribe in danger of mob takeover, whether it realized it or not. Moreover, the other major evil of large-scale gambling --- harm to the national economy -- arises regardless of whether a casino is on Indian or non-Indian land, especially when the clientele is not limited to Indians.

In this Circuit, "the immunity of Indian use of trust property from state regulation [is] based on the notion that trust lands are a Federal instrumentality held to effect the Federal policy of Indian advancement." Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 666 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1977). Under this view, it would be most inappropriate for immunity from state

regulation to defeat the federal policies of opposition to large-scale gambling, protection of legitimate organizations from organized-crime infiltration, and promotion of the welfare of Indians. Therefore, we hold that § 1955 extends even to Indians on Indian lands who are immune from state law, and the convictions of Farris, Satiacum, Bertha Turnipseed and MacKenzie Turnipseed are affirmed.

2. Non-Puyallup Appellants

Since § 1955 extends to Indian country, and the Washington gambling laws extend to non-Puyallups on Puyallup land, there is no doubt that the § 1955 convictions of non-Puyallups Baker, Powell, Lockwood, Painter, and Ray Turnipseed must be affirmed.[3/]

C. Other Arguments

The several other arguments that appellants raise lack merit.

1. Preemption

Appellants assert that 15 U.S.C. § 1175, which specifically makes it "unlawful to . . . possess . . . any gambling device . . . within Indian country," should be construed to preempt the field of federal regulation of gambling on reservations and make § 1955 inapplicable there. But the phrase "gambling device" in § 1175 is limited in 15 U.S.C. § 1171(a) to slot machines and other gambling machines and mechanical devices, which the casinos here were conspicuously cautious to avoid. Section 1955 covers all kinds of gambling, including the kinds involved in this case. Moreover, the comprehensive § 1955 was passed 19 years after § 1175. Therefore, we hold that § 1175 does not preempt all other federal regulation of gambling on reservations, and the United States was free to proceed, in the exercise of prosecutorial discretion, under § 1955. See

Hutcherson v. United States, 345 F.2d 964, 967 (D.C. Cir.), cert. denied, 382 U.S. 894 (1965).

Nor are we convinced that § 1955's harsher penalty proves that Congress meant only § 1175 to apply to Indians. The federal interests challenged by a violation of § 1955 (large-scale gambling subject to mob involvement) are more weighty than those affected by a violation of § 1175 (possession of a gambling machine on an Indian reservation). Moreover, the harm to the federal interests protected by § 1955 of a casino on Puyallup land would be as great as that flowing from a similar casino in San Francisco or Chicago.

2. Exemption from State Law

The Puyallup appellants argue that if the state gambling laws may be enforced against them through § 1955, their treaty-based right to be free from the state

criminal jurisdiction will be vitiated. But the Puyallups are subject to the plenary criminal jurisdiction of Congress, which can freely adopt state gambling laws expressly or by reference. Especially is this true where Congress acts not merely in aid of state law, but to secure independent federal interests, as it did by enacting § 1955. Moreover, Washington state's gambling laws would be enforceable by the United States against Puyallups on their reservation even in the absence of § 1955. The enclave laws of the United States are extended to Indian country by 18 U.S.C. § 1152 (but not as to "offenses committed by one Indian against the person or property of another Indian," id.). One such enclave law is the Assimilative Crimes Act, 18 U.S.C. § 13.[4/] Therefore, we have held that Washington's prohibitory (but not regulatory) laws can be enforced by the

federal government on the Puyallup reservation. United States v. Marcyes, 557 F.2d 1361, 1364 (9th Cir. 1977); see United States v. Sosseur, 181 F.2d 873 (7th Cir. 1950). Like the Washington law against the possession of dangerous fireworks, considered in Marcyes, the Washington law against professional gambling is prohibitory despite a number of "limited exceptions." See 557 F.2d at 1364; Wash. Rev. Code § 9.46.220. Also, operating a casino with a non-Indian clientele is not an "offense" committed by one Indian against the person or property of another Indian."

3. Vagueness

Appellants claim that § 1955 is unconstitutionally vague as applied to Indians, relying on the well-recognized rule of construction that statutory ambiguities are to be resolved in favor of Indians. Their argument is that the state gambling regulations are so voluminous and

detailed that an intelligent Indian could not understand them. We reject this novel argument that detail creates vagueness. Moreover, these appellants were not tripped up by a detail, but flagrantly violated the core of the state law, albeit they were beyond the state's jurisdiction.

4. Fundamental Fairness

Appellants also raise a due process (fundamental fairness) point against applying § 1955 to an Indian who in good faith believed that state gambling laws did not reach him on the reservation. But this prosecution is under the federal § 1955, which the Puyallup appellants apparently gave no thought to, and did violate. Any unfairness that they might feel subjected to here does not rise to the level of a due process/fundamental fairness violation, especially considering that their conduct was not exactly simon-pure.

5. Tribal Regulation

Although the Puyallup Tribe temporarily enacted a Gambling Code after the events involved in this case, no such tribal regulation was in effect at the time appellants' casinos were operating. Therefore we need not consider what effect such tribal regulation would have.

6. Freedom From Organized-Crime Influence

Some appellants argue that their casino was never polluted by organized crime. This does not, however, prevent conviction under § 1955. United States v. Sacco, 491 F.2d at 1000.

7. Instructions as to Baker

Baker contends that it was error to refuse his proffered instructions that state gambling laws do not apply to Indians on Indian land and that the Government must prove beyond a reasonable doubt that he

knew his gambling operation violated state law.

Since Baker is not an Indian, the refusal of the first request was harmless, at worst. On the specific intent point, the court instructed that § 1955 requires "specific intent to facilitate an activity which the accused knew to be unlawful under state law." This captured the gist of Baker's request and may in any event have been a more favorable instruction than the law entitled him to.

IV. Conclusion

The convictions of all the appellants are AFFIRMED.

s/Herbert Y.C. Choy
United States Circuit Judge

Footnotes

1. [Reference on page 4]

Powell is one-fourth Cherokee. Because only Puyallups are exempt from state regulation on the Puyallup reservation, however, we consider him a non-Indian for the purposes of this case.

2. [Reference on page 9]

In 1968 Congress passed the Indian Civil Rights Act, retracting from the states some of this power to assert jurisdiction. Previous assertions were honored, but for a future assertion to be effective not only must the state enact legislation, but tribal consent must also be obtained. 25 U.S.C. § 1321(a). The Puyallups have never given their consent to any state jurisdiction. Thus Wash. Rev. Code § 37.12.010 would be invalid if it were passed for the first time today, but it is valid law because it was passed in 1963, during the reign of Section 7 of "Public Law 280."

3. [Reference on page 11]

Baker was also found guilty of violating 18 U.S.C. § 1952 for his interstate travel in aid of his gambling business. We affirm this conviction for the same reasons we affirm his § 1955 conviction.

4. [Reference on page 13]

> Whoever within [a federal enclave] is guilty of any act or omission which, although not made punishable

> by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

18 U.S.C. § 13.

[Filed June 11, 1980]
Clerk, U.S. Court of
Appeals

UNITED STATES v. FARRIS et al.
Nos. 78-3517 et seq.

BROWNING, Circuit Judge, concurring in part, dissenting in part:

I concur in Judge Choy's opinion insofar as it affirms the conviction of defendants who are not Puyallup Indians.

The indictments charged that the various defendants had engaged in "an illegal gambling business . . . involving the playing of blackjack, poker and dice in violation of the law of the State where the gambling business was conducted (R.C.W. 9.46)." The chapter of the Revised Code of Washington cited in the indictments provides for the licensing and regulation of gambling activities, and imposes criminal penalties for violation of the statute (R.C.W. 9.46.180), or of regulations

adopted pursuant to the statute (R.C.W. 9.46.185).

It is conceded that the State could not prosecute the Puyallup appellants under the provisions of the Washington Code cited in the indictment. As Judge Choy points out, the State of Washington has elected not to exercise jurisdiction over gambling offenses committed by Indians on Indian lands unless the tribes request the State to do so, and the Puyallups have not. The decision not to assert jurisdiction expresses the State's general policy to exercise criminal jurisdiction over Indian reservations in a way that leaves "play for tribal self-government." Washington v. Yakima Indian Nation, 439 U.S. 463, 499 (1979).

Nevertheless, Judge Choy adopts the position that the actions of the Puyallups "were a 'violation of the law of a state'

for purposes of § 1955." This interpretation of the statute seems to me to be untenable. It exceeds the limits of reasonable construction to hold that conduct which could not be punished under the state law is nonetheless "a violation of the law of [the] State" within the meaning of 18 U.S.C. § 1955. Conduct to which the law is inapplicable does not violate the law in the ordinary meaning of those words. The idea that a person can transgress state law by conduct not punishable under that state law is inconsistent with minimum notions of notice and fairness.

Nothing in the legislative history of section 1955 supports the thesis that Congress intended to punish conduct that violated a state's policy on gambling even though it did not violate state law. The expressed purpose of Congress was to confer federal jurisdiction over the major forms of "illegal gambling" (see e g., H.R. Rep.

No. 1549, 91st Cong., 2d Sess. 53 (1970); S.Rep. No. 617, 91st Cong., 1st Sess. 73 (1969)), and there is no reason to suppose that the term "illegal gambling" was used in any but its common sense of "in violation of the law."

The federal statute was intended to aid local law enforcement efforts. Congress did not intend to assert federal jurisdiction where state law allowed no local law enforcement effort at all. In the words of the Senate floor manager, the purpose of the federal statute was to "add to . . . local efforts the expertise, the manpower and the full resources of the Federal Bureau of Investigation, and other appropriate agencies of the Federal Government" (emphasis added). 116 Cong. Rec. 591 (1970) (remarks of Senator McClellan). Section 1955 was designed to improve "the established State-Federal law enforcement partnership", solitary federal action was

seen to be necessary "where local and State governments have been rendered powerless because of the corruption of the responsible officials." 116 Cong. Rec. 604 (1970) (remarks of Senator Allott). "This limited federal intervention should serve to reinforce the powers of the States and local governments in our federal system, rather than inject the Federal Government into a responsibility traditionally left to the state." S. Rep. No. 617, 91st Cong., 1st Sess. 74 (1969).

Judge Choy's opinion justifies an expansive reading of section 1955 based on a supposed "policy underlying § 1955 . . . that large-scale gambling is dangerous to federal interests wherever it occurs." The legislative history suggests no such policy. Congress was not concerned with gambling per se. The statute was addressed to what Congress perceived as a vicious circle of illegal gambling resulting in

large profits which the criminal element then used to corrupt local officials -- to purchase protection for illegal gambling and other unlawful activities, thus further expanding their illegal operations and increasing their profits. In the preamble to the portion of the Organized Crime Control Bill that later became 18 U.S.C. § 1955, the Senate made the special finding that illegal gambling operations thwarted the enforcement of criminal laws by "the corruption and bribery of State and local official." S. Rep. No. 617, 91st Cong., 1st Sess. 16 (1969). The same belief was expressed in the House. 116 Cong. Rec. 35295 (1970) (remarks of Congressman Poff). Federal intervention was thought necessary to make state and local laws effective "where local and state governments have become, in effect, incapable of law enforcement by reason of the corruption of

responsible officials." S. Rep. No. 617 at 74. The prohibition of illegal gambling businesses were coupled with a prohibition of conspiracies to obstruct state law in furtherance of illegal gambling. See Organized Crime Control Act of 1970, Title VIII, Part B, 94 Stat. 922 (1970), codified as 18 U.S.C. § 1511.

Conduct that violates state law only in the sense that it is contrary to state policy, and that is subject neither to criminal penalties nor to civil sanctions imposed at the instance of law enforcement officials, would not pose the problems with which Congress was concerned. In the case at hand, for example, there was no need for the Puyallups to bribe state officials when there was no law under which the state could prosecute them.

Under the theory expressed in Judge Kennedy's concurrence, all those involved

in a gambling business would be subject to federal prosecution if the involvement of any of them violated state law. The legislative history does not support so expansive a reading: there is nothing to suggest that Congress intended persons innocent under state law to answer under Section 1955 for the crimes of their associates.

Because no state or local law prohibited the actions of the Puyallup defendants, 18 U.S.C. § 1955 does not apply. The convictions of these defendants should be reversed.

[Filed June 11, 1980]
Clerk, U.S. Court of
Appeals

United States v. FARRIS et al.
Nos. 78-3517 et seq.

KENNEDY, Circuit Judge, concurring:

I concur in the affirmance of the convictions of all the appellants. Although there are persuasive policy reasons, elaborated in Judge Choy's opinion, for applying section 1955 to the Puyallup appellants, I am more persuaded by a simple and literal reading of the statute. The statute makes it a violation of federal law to operate "an illegal gambling business." The federal statute focuses on whether the business itself is "a violation of the law of a State," and the gambling operation in this case necessarily involved violation of state law, inasmuch as the non-Indian partners were subject to state prosecution by their operation of the business. This is sufficient to constitute the business

itself, in its entirety, an "illegal gambling business" for the purposes if section 1955. That only some of the acts of the operators of the business were subject to state prosecution is to me immaterial to the question whether or not the business is an illegal gambling business for the purposes of federal law. The gambling casino in question was a single entity, an entity that was operated in violation of Washington law, and there was no separate, legally isolated portion of the gambling casino in which the Indians alone were involved.

If section 1955 were to read: "Whoever conducts, finances, manages, . . <u>in violation of state law</u>, a gambling business shall be fined not more than $20,000 or imprisoned not more than five years," then we would be presented with the issue upon which Judge Browning bases his dissent. The italicized language is,

however, not in the statute. In my view, the reading of the statute I propose is not only literally persuasive, but also rests on the common-sense proposition that a gambling enterprise that entails clear and unambiguous violations of state law by the non-Indian operators is certainly no less within either the policy or the plain language of section 1955 merely because it also entails acts by Indian operators that may or may not be violations of state law. It is a defendant's involvement in a business that a state prohibits, rather than his commission of particular individual acts that a state may prosecute, that constitutes the defendant's violation of section 1955. I would leave for another day the question addressed by Judges Browning and Choy whether or not the

federal statute would also prohibit a gambling business operated exclusively by Indians on a reservation.

United States Circuit Judge

APPENDIX A-2

[Filed
August 14, 1980]
Clerk, U. S. Court
of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. HAROLD FARRIS, Defendant-Appellant.	No. 78-3517 DC CR 78-40-1
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JODY SATIACUM, Defendant-Appellant.	No. 78-3567 DC CR 78-52-1
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ALLEN DUDLEY POWELL, Defendant-Appellant.	No. 79-1013 DC CR 78-35

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LOUIS J. BAKER, Defendant-Appellant.	No. 78-1015 DC CR 78-40-3
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RAY TURNIPSEED, BERTHA TURNIPSEED, and MACKENZIE TURNIPSEED, Defendant-Appellant.	No. 79-1313 DC CR 78-76T-1/2/3
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DAVID PAINTER, Defendant-Appellant.	No. 79-1337 DC CR 78-76-4

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 78-1338
v.	)	DC CR 78-76-5
MELVYN LOCKWOOD, Defendant-Appellant.	)	ORDER

Before: BROWNING, CHOY and KENNEDY, Circuit Judges,

The Opinion in this case is amended (1) by deleting the sentence on page 10, lines 26-28 ("Casinos would operate in a major population center without any state or federal (or tribal) regulation."); (2) by amending the succeeding sentence to read, "It might not be long before organized crime invaded the Puyallup reservation."; (3) by deleting the first six words of the sentence on page 6, line 23 ("Exempt from federal and state regulation".)

The petitions for rehearing of Baker, Farris, Satiacum and Powell are denied. We interpret the Turnipseeds' petition for

rehearing en banc also to be a petition for rehearing; the petition for rehearing to the panel is denied and the suggestion for rehearing en banc is rejected.

APPENDIX A-3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff v. ROBERT SATIACUM, LUCKY INDIAN CASINO 'N BAR, EDWARD WAYNE CUTLER, RICHARD LAWRENCE FLINK, DANIEL JAMES SATIACUM, CLARENCE BERT BUTLER, GENE ALLEN THOMAS, KAREN LEE SATIACUM, YOSHIKO OUCHI PHEMISTER, and BOYD TAYLOR RINES, Defendants.	NO. C76-101T INJUNCTION

Robert Satiacum, Lucky Indian Casino 'N Bar, Edward Wayne Cutler, Richard Lawrence Flink, Daniel James Satiacum, Yoshiko Ouchi Phemister and Boyd Taylor Rines, their agents, employees, representatives, officers, associates, and/or those acting in concert or participation with any of the foregoing are each hereby enjoined from:

Running, operating, conducting, financing, supervising, directing, owning or providing equipment or services to any gambling activity that violates Federal law, including gambling activities in violation of Washington State law, or any Indian Reservation within the Western District of Washington. As to those gambling activities which are licensable under Washington State Law, defendants shall be permitted on any Indian Reservation in the same gambling activities which are being licensed outside of Indian Reservations by the Washington State Gambling Commission at the time in question.

DATED this 21st day of January, 1977.

s/
United States District Judge

Approved for Entry:

s/Jack E. Tanner
JACK E. TANNER, Attorney
for Defendants
Robert Satiacum; Lucky Indian Casino 'N Bar; Edward Lynn Cutler, Richard Lawrence Flink; Daniel James Satiacum; Clarence Bert Butler; Karen Lee Satiacum; Yoshiko Ouchi Phemister; and Boyd Taylor Rines

s/John E. Robinson
JOHN E. ROBINSON, Attorney
for Gene Allen Thomas

s/J. Ronald Sim
J. RONALD SIM
United States Attorney

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	
	)	
RAY TURNIPSEED,	)	NO: 79-1313
	)	
Defendant-Appellant;	)	
BERTHA J. TURNIPSEED,	)	NO: 79-1313
	)	
Defendant-Appellant;	)	
MACKENZIE TURNIPSEED,	)	NO: 79-1313
	)	
Defendant-Appellant.	)	
	)	

PETITION FOR REHEARING IN BANC

Appeal from the United States District
Court for the Western District
of Washington

The Honorable Donald S. Voorhees
United States District Judge

DONALD H. McGAVICK
Attorney for Defendant-Appellant Turnipseed

Suite 1700, One Washington Plaza
Tacoma, Washington 98402
Telephone: 206-572-6677

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

RAY TURNIPSEED, BERTHA J. TURNIPSEED and MACKENZIE TURNIPSEED, the defendant-appellants above named, presents this, their petition for a rehearing in the above entitled cause, and, in support thereof, respectfully show:

I.

The Court, in its opinion of affirming herein, has failed to apply the "regulatory vs. prohibition" in the indictment of charges against the appellants Turnipseeds for the "illegal gambling business involving the playing of blackjack and poker, in violation of the laws of the state . . ." All the activities that the appellants did, are permitted by the Washington State Law via RCW 9.46.010 et. seq., and is further reiterated by Washington Administrative Code, WAC 230.02.010 through 230.60. The

Preamble to the Washington State Gambling Commissions Regulations, reads in part as follows:

> The Commission shall be responsible for: ". . . the licensing and regulatory agency charged with the authority and duty to control statutory, authorized and professional gambling activities."

Therefore, there was no violation of the laws of the State of Washington which would make 18 U.S.C. § 1955 applicable to the defendant-appellants Turnipseeds.

Judge Browning points out in his dissent:

> There is nothing to suggest that Congress intended persons innocent under state law, to answer under § 1955 for the crimes of their associates.

II.

That attached hereto is a copy of Exhibit 16, which exhibit had not been received by the Court at the time of oral argument. This was an order signed by the Honorable Donald S. Voorhees on January 21,

1977, in the case of United States of America, plaintiff, vs. Robert Satiacum, et al, defendants. The order on page two, provides in part as follows:

> As to those gambling activities which are licensable under Washington State Law, defendants shall be permitted on any Indian reservation to engage in the same gambling activities which are being licensed outside the Indian reservations by the Washington Gambling Commission at the time in question. (Emphasis added)

The lawyer who represented defendants in that case, also represented the Turnipseeds, and relied upon that order in advising the Turnipseeds. Under the case of United States vs. Critzer, 498 F.2d 1160 (4th Cir. 1934), the defendant-appellee would not be held responsible under 18 U.S.C. § 1955, because the law is vague and highly debatable and the order of the court clearly allows the Turnipseeds to do just what activity they did in fact do.

Exhibit 16 was prepared by the United States Attorneys' office. The matter was stipulated to in open court and no appeal was taken by anyone in that action.

III.

That inasmuch as the decision so far as defendant-appellants are concerned, it is a 2-1 decision, and the matter should be set for rehearing in banc.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that the Petition for Rehearing in banc be granted, and the judgment of the District Court be, upon further consideration, reversed.

Respectfully submitted,

McGAVICK, BURGESS & HELLER
Attorney for Defendant-
Appellants

BY: s/
DONALD H. McGAVICK

I, DONALD H. McGAVICK, attorney for Defendant-Appellants, do hereby certify that the foregoing Petition for a Rehearing of this cause is presented in good faith and not for purpose of delay.

s/
DONALD H. McGAVICK

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that one copy of the foregoing Petition for Rehearing In Banc was served upon Appellee by depositing the same in the United States Mail at the United States Post Office, 1102 A Street, Tacoma, Washington, 98402, addressed to:

CHRISTINE McKENNA
Assistant United States Attorney
10th Floor, United States Courthouse
Fifth and Madison
Seattle, Washington 98104

s/
VICKIE L. POYNTER,
Secretary

DATED: June 23, 1980

APPENDIX C

10 STAT. 1132 (1855)

TREATY OF MEDICINE CREEK
NISQUALLY, PUYALLUP, ETC.

FRANKLIN PIERCE, President of the United States of America, to all and singular to whom these presents shall come, greeting:

Whereas a treaty was made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, on the twenty-sixth day of December, one thousand eight hundred and fifty-four, between the United States of America and the Nisqually and other bands of Indians, which treaty is in the words following, to-wit:

> Articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom,

Squawskin, S'Homamish, Steh-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians, occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

ARTICLE 1. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title and interest in and to the lands and country occupied by them, bounded and described as follows, to-wit: Commencing at the point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence running in a south-easterly direction, following the divide between the waters of the Puyallup and Dwamish, or White Rivers, to the summit of the Cascade Mountains; thence southerly, along the summit of said range, to a point opposite the main source of the Skookum

Chuck Creek; thence to and down said creek, to the coal mine; thence northwesterly, to the summit of the Black Hills; thence northerly, to the upper forks of the Satsop River; thence northeasterly, through the portage known as Wilkes's Portage, to Point Southworth, on the western side of Admiralty Inlet; thence around the foot of Vashon's Island, easterly and southeasterly, to the place of beginning.

ARTICLE 2. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: The small island called Klah-che-min, situated opposite the mouths of Hammersley's and Totten's Inlets, and separated from Hartstene Island by Peale's Passage, containing about two sections of land by estimation; a square tract containing two sections of land by estimation, a square tract containing two

sections, or twelve hundred and eighty acres, on Puget's Sound near the mouth of the She-nah-nam Creek, one mile west of the meridian line of the United States land survey, and a square tract containing two sections, or twelve hundred and eighty acres, lying on the south side of Commencement Bay; all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed

or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their reserves, and, on the other hand the right of way with free access from the same to the nearest public highway is secured to them.

ARTICLE 3. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

ARTICLE 4. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of thirty-two thousand five hundred dollars, in the following manner, that is to say: For the first year after the ratification hereof, three thousand two hundred and fifty dollars; for the next two years, three thousand dollars each year; for the next three years, two thousand dollars each year; for the next four years, fifteen hundred dollars each year; for the next five years, twelve hundred dollars each year; and for the next five years, one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians under the direction of the President of the United States, who may, from time to time, determine, at his discretion, upon what beneficial objects to expend the same. And the

superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE 5. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand two hundred and fifty dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

ARTICLE 6. The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem

fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued, under the direction of the President, and payment be made accordingly therefor.

ARTICLE 7. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE 8. The aforesaid tribes and bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defense, but will submit all matters of difference between them and other Indians to the Government of the United States, or its agent, for decision,

and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article, in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 9. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same; and therefore it is provided, that any Indian belonging to said tribes, who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE 10. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support, for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands, in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school,

shops, employees, and medical attendance, to be defrayed by the United States, and not deducted from the annuities.

ARTICLE 11. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

ARTICLE 12. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States; nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE 13. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

Proclaimed March 3, 1855.

APPENDIX D

9.46.010 Legislative declaration . . .

> The legislature further declares that the conducting of bingo, raffles, and amusement games and other social pastimes, when conducted pursuant to the provisions of this chapter and any rules and regulations adopted pursuant thereto, are hereby authorized, as are only such lotteries for which no valuable consideration has been paid or agreed to be paid as hereinafter in this chapter provided . . .

9.46.030 Certain gambling activities authorized . . .

> (4) The legislature hereby authorizes any person, association, or organization operating an established business primarily engaged in the selling of food or drink for consumption on the premises to conduct social card games and to utilize punch boards and pull-tabs as a commercial stimulant to such business when licensed and utilized or operated pursuant to the provisions of this chapter and rules and regulations adopted pursuant thereto.
>
> (5) The legislature hereby authorizes any person to conduct or operate amusement games when licensed and operated pursuant to the provisions of this chapter and rules and regulations adopted by the commission at such locations as the commission may authorize . . .

9.46.070 Gambling commission - Powers and duties. The commission shall have the following powers and duties . . .

> (2) To authorize and issue licenses for a period not to exceed one year to any person, association, or organization approved by the commission meeting the requirements of this chapter and any rules and regulations, adopted pursuant thereto permitting said person, association, or organization to utilize punch boards and pull-tabs, and to conduct social card games as a commercial stimulant in accordance with the provisions of this chapter and any rules and regulations adopted pursuant thereto and to revoke or suspend said licenses for violation of any provisions of this chapter and any rules and regulations adopted pursuant thereto. . .

37.12.010 Assumption of criminal and civil jurisdiction by state. The State of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd

Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed or by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

(1) Compulsory school attendance;

(2) Public assistance;

(3) Domestic relations;

(4) Mental illness;

(5) Juvenile delinquency;

(6) Adoption proceedings;

(7) Dependent children; and

(8) Operating of motor vehicles upon public streets, alleys, roads and highways: Provided further, That Indian tribes petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted.

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